NO. 03-4212

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD ASSOCIATES, LLC,
PETITIONERS
(RELATED TO U.S. BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE)
(NO. 00-3837)

ON PETITION FOR WRIT OF MANDAMUS TO JUDGE ALFRED M. WOLIN,
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY,
SITTING BY DESIGNATION
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

ANSWER OF OWENS CORNING TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS

DATED: NOVEMBER 20, 2003

NORMAN L. PERNICK
J. KATE STICKLES
SAUL EWING LLP
222 DELAWARE AVENUE, SUITE 1200
WILMINGTON, DE 19801
(302) 421-6800

AND

CHARLES O. MONK, II
MATTHEW G. DOBSON
SAUL EWING LLP
100 SOUTH CHARLES STREET
BALTIMORE, MD 21201
(410) 332-8600

COUNSEL TO OWENS CORNING *ET AL.*

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Respondents Owens Corning and its affiliated debtors and debtors-in-possession (collectively, "Owens Corning") in the cases pending before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Cases") respectfully submit this Answer to the Emergency Petition for a Writ of Mandamus.

INTRODUCTION

"The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming." *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978).

The Emergency Petition for a Writ of Mandamus (the "Petition") submitted by Petitioners Kensington International Limited and Springfield Associates, LLC (collectively, "Kensington") and joined by Credit Suisse First Boston ("CSFB") (jointly "Petitioners") should be dismissed. First, it is untimely. Far from being "recently learned" (Pet. at 2), the fact that court advisors C. Judson Hamlin ("Hamlin") and David R. Gross ("Gross") (the "Advisors") represent future asbestos claimants in the *G-I Holdings, Inc.* ("*G-I*") bankruptcy has been on the public record and known to Petitioners' various counsel for almost two years. During this time, Petitioners and other interested parties in this complex bankruptcy case have engaged in time-consuming and contentious litigation before the District Court over the terms of Owens Corning's reorganization. Only now, when Petitioners fear an adverse

ruling from the District Court, do they resurrect old information to seek to disqualify the District Court. To put it bluntly, Kensington and CSFB cannot lie in wait and time the commencement of their recusal campaign to serve their strategic interests.

Second, Petitioners fail to demonstrate the "clear and indisputable" grounds that allegedly warrant recusal. Petitioners do not argue that the District Court itself has engaged in improper conduct or even conduct that raises the appearance of impropriety. The District Court's Response makes clear that no such grounds exist. The affidavits of the District Court's Advisors likewise demonstrate neither an appearance of impropriety nor actual prejudice to Petitioners' interest because of Hamlin's and Gross's limited involvement in this case. Consequently, Petitioners' alleged grounds for recusal are reduced to the contrived and untenable argument that the District Court's appointment of, and limited contact with, Advisors who have a role as advocates in another bankruptcy case is "clearly and indisputably" enough to compel this Court to grant the Writ of Mandamus. Third, Kensington prematurely filed the Petition seeking mandamus relief even before the District Court had the opportunity to determine whether its recusal, or the recusal of its Advisors, was warranted. If this Court cannot deny the Petition on the record before it, this matter should be remanded to the District Court.

STANDARD OF REVIEW

"[I]t is widely accepted that mandamus is extraordinary relief that is rarely invoked." *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001). Therefore, "[a] party seeking the writ has the burden of demonstrating that its right to the writ is 'clear and indisputable.'" *Delgrosso v. Spang and Co.*, 903 F.2d 234, 237 (3d Cir. 1990), *cert. denied*, 498 U.S. 967 (1990). *See also In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *reh'g denied*, 869 F.2d 116 (2d Cir. 1989), *cert. denied*, *Milken v. SEC*, 490 U.S. 1102 (1989). This Court has consistently held that it will issue a writ of mandamus only if, in its discretion, it finds that "the party [seeking the writ] ha[s] no other adequate means to attain the desired relief . . . [and] the court below . . . committed a clear error of law [that approaches] the magnitude of . . . a failure to use [judicial] power. . . ." *In re Sharon Steel Corp.*, 918 F.2d 434, 436 (3d Cir. 1990), *quoting Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988).

In the context of a motion to recuse a district judge, the governing standard is "whether a reasonable person, knowing all the acknowledged circumstances, might question the district judge's continued impartiality." *In re Sch. Asbestos Litig.*, 977 F.2d 764, 781 (3d Cir. 1992). *See also, In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 343 (3d Cir. 1998), *cert. denied sub nom., Krell v. Prudential Ins. Co. of America*, 525 U.S. 1114 (1999).

The court "ask how [these facts] appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995). In enacting Section 455, Congress cautioned that tactical motives often lie behind recusal motions:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in the proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to a judge of their own choice.

H.R. Rep. No. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

Importantly, motions seeking recusal must be promptly made once the grounds are known or reasonably knowable to the party seeking disqualification. *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 236-37 (3d Cir. 2001). *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) (the timeliness requirement "prohibits knowing concealment of an ethical issue for strategic purposes"). *See also* 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3550 (2d ed. Supp. 2003).

FACTUAL BACKGROUND

Petitioners' one-sided factual recitation fails to place their recusal motion in the context of the complex proceedings currently before the District Court.

A. The Owens Corning Bankruptcy

Owens Corning filed for bankruptcy protection on October 5, 2000 (the "Petition Date") in the United States Bankruptcy Court for the District of Delaware. The Chapter 11 filing was prompted by the massive number of asbestos personal injury claims confronting this global building products manufacturer. Owens Corning was not alone in this regard. At or around this time, four other large building products manufacturers filed bankruptcy petitions in the District of Delaware as a result of asbestos liabilities.[1]

On November 27, 2001, then-Chief Judge Edward R. Becker assigned these five Delaware asbestos-related bankruptcies to Senior District Judge Alfred M. Wolin.[2] In making the assignment, Judge Becker stated:

> [I]t is my considered judgment that these bankruptcy cases, which carry with them tens of thousands of asbestos claims, need to be consolidated before a single judge so that a coordinated plan for management can be developed and implemented . . . As a significant portion of the asbestos cases in this country are proceeding under the aegis of this litigation, I deem this assignment and consolidation critically important to the administration of justice.

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[1] *In re Armstrong World Industries, Inc., et al.*, Case Nos. 00-4471, *et al.* (RJN); *In re Federal Mogul Global, Inc., et al.*, Case Nos. 01-10578, *et al.* (RJN); *In re USG Corp., et al.*, Case Nos. 01-2094, *et al.* (RJN); and *In re W.R. Grace & Co., et al.*, Case Nos. 01-1139, *et al.* (JKF).

[2] *In re Combustion Engineering*, Case Nos. 03-10495, *et al.* (JKF), another asbestos-related bankruptcy, was subsequently assigned to Judge Wolin as well.

See Petitioners' Appendix to Emergency Petition for a Writ of Mandamus ("Pet. App.") 40-41.[3]

On December 20, 2001, the District Court held a conference with participants in all five cases and informed the parties that a number of experienced counsel with asbestos and mass tort litigation backgrounds would be appointed as special advisors to assist with case management. Owens Corning Appendix ("OC App.") 4, (Dist. Ct. Response at 4).[4] On December 28, 2001, the District Court entered an Order in all five cases stating:

> William A. Dreier, Esq., David R. Gross, Esq., C. Judson Hamlin, Esq. John E. Keefe, Esq. and Professor Francis E. McGovern are hereby designated as Court Appointed Consultants to advise the Court and to undertake such responsibilities, including by way of example and not limitation, mediation of disputes, holding case management conferences, and consultation with counsel, as the Court may delegate to them individually, . . . and . . . the parties are on notice that the Court may, without further notice, appoint any of the Court Appointed Consultants to act as a

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[3] The *G-I* bankruptcy case is pending before Chief Judge Rosemary Gambardella in the District of New Jersey and is not among the cases assigned to Judge Wolin; however, many of *G-I's* significant creditors and their counsel are the same as in the five asbestos-related bankruptcy cases pending in Delaware. *See In re G-I Holdings, Inc.*, 295 B.R. 502 (D. N.J. 2003).

[4] The District Court's inherent authority to appoint extra-judicial advisors is well established in complex proceedings such as this. *See* Fed. R. Civ. P. 53; *In re Peterson*, 253 U.S. 300, 312-13 (1919) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause").

> Special Master to hear any disputed matter and to make a report and recommendation to the Court on the disposition of such matter.

Pet. App. 50.

Each of the Advisors is a well-known and distinguished attorney or former judge whose legal or judicial experience involves asbestos or mass tort litigation. In January 2002, MEALEY'S ASBESTOS BANKRUPTCY REPORT reported the appointments by Judge Wolin and the Advisors' relevant experience:

> The consultants appointed include William A. Drier, former presiding judge in the appellate division of the Superior Court of New Jersey; John E. Keefe Sr., a former Superior Court judge in New Brunswick, N.J.; David R. Gross, a partner in the law firm of Budd, Larner, Gross, Rosenbaum, Greenberg & Sade of Short Hills, N.J., and former national [defense] counsel for Johns-Manville; C. Judson Hamlin, the future legal representative of present and future holders of asbestos-related demands in *G-I Holding's* Chapter 11 case and partner of the Purcell, Ries, Shannon, Mulcahy & O'Neill law firm in Bedminster, N.J.; and Francis E. McGovern, a law school professor at Duke University and an expert on alternative dispute resolution.

OC App. 16A-16B. Information regarding the backgrounds and practices of these Advisors was also readily available from other public sources. *See, e.g.*, Shannon D. Murray, *Letter from Delaware: Judge Names Asbestos Consultants*, THE DAILY DEAL, Jan. 9, 2002 (noting, for example, that Gross "has served as a national [defense] counsel for Johns-Manville's asbestos litigation case"). OC App. 19-20. *See also* OC App. 22 (Affidavit of David R. Gross at ¶ 2).

B. Petitioners' Interest in the Bankruptcy Case

CSFB is the agent bank for a syndicate of pre-petition lenders who entered into a $2 billion Credit Agreement dated June 26, 1997 with Owens Corning (the "Owens Corning bank debt"). Kensington has asserted that it purchased $275 million (face value) of the Owens Corning bank debt after the Petition Date. Pet. at 2. CSFB and Kensington play a lead role among the group of Owens Corning bank debt holders (the "Bank Group") and sit on the Bank Group Steering Committee.[5] The Bank Group, including Kensington, is collectively represented in these bankruptcy proceedings by Kramer, Levin, Naftalis & Frankel ("Kramer Levin"), as counsel to CSFB (the lead agent bank). OC App. 112-113, 565-596.

More broadly, Owens Corning's commercial creditors, including the Bank Group, are represented by the Official Committee of Unsecured Creditors (the "Creditors Committee") appointed by the U.S. Trustee.[6] The Creditors Committee is

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[5] The other members of the Owens Corning Bank Group Steering Committee are: J.P. Morgan Chase and Angelo Gordon & Co.

[6] Originally, the Creditors Committee was comprised of nine members: Credit Suisse First Boston, The Chase Manhattan Bank, Barclays Bank PLC, Fleet National Bank, Metropolitan Life Insurance Company, John Hancock Life Insurance Company, Jackson National Life Insurance Company, Minnesota Mining & Manufacturing Company and Enron Energy Services Operations, Inc. OC App. 114. Later, the Creditors Committee's membership was reduced in number but the Bank Group, represented by Credit Suisse First Boston and The Chase Manhattan Bank (now J.P. Morgan Chase) continue to be members. Fleet and J.P. Morgan Chase were also lenders to *G-I*'s subsidiary, Building Materials Corporation of America, and, until July 2003, were involved in the *G-I* bankruptcy. They were part of a

comprised of representatives of Owens Corning's creditors holding unsecured claims, (including bank debt holders, bondholders and trade creditors) and is charged with the responsibility of representing their common interests in the bankruptcy proceedings. OC App. 114-115. One holder of the bank debt, J.P. Morgan Chase, is the Creditors Committee's co-chair and a member of the Bank Group Steering Committee. CSFB, as agent for the Bank Group, has always been a member of the Creditors Committee.

Both the Creditors Committee and the Bank Group have been active litigants throughout the Owens Corning bankruptcy case. As such, each has received the Advisor's fee applications containing detailed time entries setting forth services performed. Neither has ever previously objected to the appointment of any of the Advisors or the type of services performed by them as reflected in their time records.

C. Petitioners' Knowledge of Hamlin's and Gross's Roles in *G-I*

Kensington claims in its petition that it "recently learned" of Hamlin's and Gross's appointments in *G-I*. Pet. at 2. The public record proves to the contrary. CSFB does not even address when it allegedly learned of these appointments.

The appointments of Hamlin and Gross were a matter of public record when made. In *G-I*, Hamlin was appointed Legal Representative of Present and Future Holders of Asbestos-Related Demands (the "Legal Representative") in October 2001.

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lending syndicate led by Bank of New York, which represented the interests of the syndicate and actively participated on their behalf in *G-I*. OC App. 116-118.

OC App. 355-379. Gross was appointed as local counsel to the Legal Representative in January 2002. OC App. 119-132. In December 2001 Hamlin and Gross were both appointed advisors to Judge Wolin. Pet. App. 49-53. In fact, in connection with Gross's appointment in *G-I* as the Legal Representative's local counsel, Gross submitted a disclosure statement reporting that he had previously been appointed by Judge Wolin to serve as one of his Advisors. OC App. 121.

These appointments were immediately reported in the asbestos and bankruptcy trade press that monitors and publicizes the activities in these bankruptcy proceeding. The January 2002 edition of MEALEY'S ASBESTOS BANKRUPTCY REPORT noted Hamlin's appointment in the *G-I* case. OC App. 17-18. The same article also noted Hamlin's recent appointment as Judge Wolin's advisor in the consolidated bankruptcy cases before him. *Id.* The same edition of MEALEY'S ASBESTOS BANKRUPTCY REPORT, in two additional articles regarding developments in Judge Wolin's cases, reported that Hamlin and Gross, among others, had been appointed as "consultants." OC App. 16A-16B. Listing each of Judge Wolin's consultants, MEALEY'S specifically described Hamlin as "the future legal representative of present and future holders of asbestos-related demands in *G-I's* Chapter 11 case and partner

of Purcell, Reis, Shannon, Mulcahy & O'Neill law firm in Bedminster, New Jersey . . . ." *Id.*[7]

In addition, Kramer Levin, counsel for the Bank Group, received copies of Hamlin's and Gross's *G-I* disclosures and appointment orders.[8] OC App. 119-132, 151-180, 355-379. The orders were served on counsel and interested parties who appeared in that case. Prior to the Hamlin and Gross appointments, Kramer Levin had entered its appearance as both a creditor and counsel in *G-I*. OC App. 126-132, 141-142. Kramer Levin has maintained its appearance in both capacities in *G-I* ever since.[9] OC App. 143-150. In its role as counsel to the Bank Group in *Owens Corning*, Kramer Levin regularly reports to both the Bank Group Steering Committee and to the Bank Group as a whole. *See, e.g.,* OC App. 184-185, 210-213, 248-250.[10]

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[7] Similar articles reporting the Hamlin and Gross appointments in the two cases were published in the January 18, 2002 edition of MEALEY'S LITIGATION REPORT: ASBESTOS. OC App. 133-136. In June 2003, Andrews Publications' ASBESTOS LITIGATION REPORTER reported Hamlin's and Gross' appointments in *G-I*. OC App. 137-140.

[8] Kensington included copies of Hamlin's appointment Order and Gross's disclosures in *G-I* in its Appendix but omitted the certificates of service that accompanied them. Those certificates of service indicated that its counsel in *Owens Corning*, Kramer Levin, had received copies of those documents at the time they were filed. *Compare* Pet. App. 293-315 *with* OC App. 119-132, 151-180, 355-379.

[9] Gross changed law firms in or about September and December 2002. Each time Gross submitted a new disclosure statement in the *G-I* case and was re-appointed as the Legal Representative's local counsel. OC App. 151-180.

[10] Kramer Levin submits its time records to Owens Corning in connection with its requests for payment of the Bank Group's attorney's fees and costs. The Creditors

Kramer Levin also routinely meets with the Creditors Committee's counsel and attends the Creditors Committee's meetings. *Id.*

Since the inception of this case, Owens Corning's Creditors Committee has routinely monitored developments in other asbestos-related bankruptcies, including *G-I*. *See, e.g.*, OC App. 291, 293, 298-299, 302, 304-307, 309, 598-603. In January 2002, when Gross was appointed in *G-I*, the Creditors Committee's counsel, Davis Polk, was actively monitoring *G-I*. OC App. 298. Indeed, in January 2002, the month Gross was appointed as local counsel in *G-I*, the Creditors Committee's counsel charged the Owens Corning estate for 5.4 hours of time "review[ing] [Judge Wolin's five-page December 28, 2001] Order Designating Court Appointed Consultants and Special Masters...." OC App. 293 (January 4, 2002 time entry for S.A. Horbaczewski). The Creditors Committee's counsel has continued to monitor and log *G-I* developments to this date, including: in October 2002, when *G-I* named Hamlin as a defendant in an adversary proceeding (OC App. 310-320, 322-323, 326, 329); in December 2002, when Gross, having changed law firms, submitted a new retention application and disclosure statement in *G-I* (OC App. 168-180, 331-336); and again in January 2003, when Hamlin filed a brief in *G-I* challenging the credentials, expertise and opinions of Dr. Letitia Chambers. Pet. App. 316-349, OC App. 341-346. Dr. Chambers is both the asbestos valuation expert retained by the

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Committee's counsel, Davis Polk & Wardwell ("Davis Polk"), submits its time records in the Owens Corning bankruptcy case in support of its fee applications.

debtor in *G-I* and the asbestos valuation expert and consultant retained by the Creditors Committee in Owens Corning. Presumably, the Creditors Committee's counsel shared all this information with its client, the members of the Creditor's Committee, including Petitioners, and Kramer Levin. At no time did the Creditor's Committee raise any objection to Hamlin's or Gross's appointments as Advisors to the District Court.

Through each of the above means, Petitioners (or their legal counsel) obtained both general and express knowledge of the Hamlin and Gross appointments in *G-I*.[11] In this context, Kensington's failure to explain how it "recently learned" the always-public information regarding Gross's and Hamlin's role in *G-I* is simply unacceptable and borders on the disingenuous. Pet. at 2.[12]

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[11] Hamlin's and Gross's appointments were also generally known to other members of the Bank Group and/or the Creditors Committee in the Owens Corning bankruptcy. For example, from the inception of *G-I* to July 2003, the Bank of New York ("BONY") served as lead bank for the lending syndicate that lent to *G-I*'s principal subsidiary, Building Materials Corporation of America ("BMCA"). That syndicate included Fleet National Bank, the Bank of Nova Scotia, Bear Stearns and Chase Manhattan (now JP Morgan Chase). All five of these entities were also members of the Owens Corning Bank Group, represented by Kramer Levin. BONY's representatives attended the October 10, 2001 hearing in *G-I* during which Hamlin's proposed appointment was discussed. OC App. 347-354. BONY, through its counsel, was served with copies of the orders appointing Hamlin and Gross in *G-I*. OC App. 119-132, 151-180, 355-379. As previously noted, BMCA syndicate member JP Morgan Chase has been a member of the Bank Group Steering Committee and co-chair of the Creditors Committee since the Owens Corning case commenced. OC App. 114-115.

D. The Litigation Pending Before the District Court

Owens Corning has proposed a Plan of Reorganization (the "Proposed Plan") that substantively consolidates Owens Corning and its subsidiary Debtors into a single bankruptcy estate. *See* Debtors' Motion for Substantive Consolidation (OC App. 380-384). Kensington and CSFB have vigorously opposed substantive consolidation because they contend that substantive consolidation will significantly reduce the Bank Group's aggregate recovery. Unlike Owens Corning's other major unsecured creditors, which have direct claims against the parent company alone, the Bank Group has guaranties from certain Owens Corning subsidiaries. If these subsidiary guaranties are enforceable, the Bank Group will receive a greater proportionate recovery than that received by other unsecured creditors. Substantive consolidation would eliminate this claimed disproportionate recovery by the Bank Group. Owens Corning has taken the position that the Bank Group did not rely upon, or expect separate recovery from, these tax-motivated guarantor subsidiaries in the event of a bankruptcy and that the guaranties do not have the value the Bank Group ascribes to them.

Shortly after the Petition Date, Owens Corning identified the potential differing interests of the unsecured creditor groups as a major obstacle to reorganization. At

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[12] Timeliness does not depend upon formal disclosure. *See, e.g., United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) (the timeliness requirement "prohibits knowing concealment of an ethical issue for strategic purposes").

Owens Corning's suggestion, the Bankruptcy Court approved and supervised an extensive "Inter-Creditor Project," a debtor-led voluntary discovery process through which hundreds of thousands of records were produced and literally thousands of factual stipulations were proposed and agreed upon. OC App. 385-393. Despite this massive disclosure of information, the parties were unable to reach consensus on substantive consolidation.

On December 23, 2002, the District Court withdrew the reference from the Bankruptcy Court with regard to the disputes relating to the substantive consolidation provision in the Proposed Plan and scheduled the matter for hearing. OC App. 394-399. The District Court appointed Advisor William A. Dreier as a special master to hear and decide discovery disputes between the parties related to the scheduled substantive consolidation hearing. *Id.* Judge Wolin did not assign Advisors Hamlin or Gross any responsibility in connection with the adjudication of the substantive consolidation dispute. OC App. 21-27, 60-64 (Affidavits of C. Judson Hamlin and David R. Gross). Gross participated only in procedural discussions regarding case management and attended a post-hearing mediation session.[13] Hamlin had no involvement whatsoever. OC App. 60-64.

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[13] Petitioners do not allege any impropriety in connection with the mediation effort, which, unfortunately, has been unsuccessful to date. Likewise, while the parties occasionally consulted former Judge Dreier to resolve discovery disputes, no actual or apparent impropriety is claimed regarding his services.

On April 8, 2003, the parties commenced a month-long hearing before the District Court on the substantive consolidation issue. That hearing involved 14 witnesses and 328 exhibits. Kensington and the other Bank Group members were represented by Kramer Levin. The Creditors Committee assigned a lawyer to monitor the entire hearing. OC App. 401-402. At the close of the hearing on May 2, 2003, the District Court took the matter *curia advisai cult.* OC App. 6-7. At no point during the lengthy proceedings or immediately thereafter did Kensington, CSFB or any other creditor express any concern regarding the impartiality of the District Court, nor did any of them lodge any objection to the involvement of any Advisor in any aspect of the substantive consolidation hearing.

E. Petitioners' Attempts to Derail the Bankruptcy Proceedings

In October 2003, anticipating an imminent decision on the substantive consolidation motion, Petitioners launched a barrage of motions and lawsuits with the obvious purpose of derailing the Owens Corning bankruptcy. They simultaneously attacked the District Court and every other participant in the case. Petitioners filed or orchestrated the filing of (1) the motion to recuse Judge Wolin (Pet. App. 3-34); (2) a motion by the Creditors Committee to appoint a Chapter 11 trustee seeking to displace Owens Corning's board and senior management on the theory that they have "sold out" to the asbestos creditors (OC. App. 403-433); (3) a motion by the Creditors Committee to "Eradicate Structural Conflicts between Asbestos Law Firms," which

seeks to replace the members of the Asbestos Claimants Committee on the grounds that they have a conflict of interest (OC App. 434-513); (4) a civil action in New York state court filed by Kensington against certain Owens Corning officers and directors alleging fraud and negligent misrepresentation with regard to certain pre-petition borrowings by Owens Corning under the Credit Agreement (OC App. 514-564); and (5) an adversary proceeding brought by the Bank Group against Owens Corning alleging fraud in connection with certain borrowings by Owens Corning under the Credit Agreement and seeking to impose a $650 million constructive trust on the Owens Corning bankruptcy estate (OC App. 565-596).

Petitioners' litigation barrage - - including the recusal motion and this Petition - - has been plainly designed to obstruct all movement towards any reorganization that includes substantive consolidation. It is a scorched-earth strategy designed to stop, delay or prevent the orderly reorganization of Owens Corning because Petitioners dislike their treatment under the Proposed Plan.

Their numerous and simultaneous actions were tactically timed to coincide with an expected decision by the District Court on the substantive consolidation issue. In the District Court's Response, it describes the importance of the substantive consolidation ruling in no uncertain terms:

> This Court believes that it is safe to presume that resolution of the substantive consolidation issue will be the single most momentous event in the life of this important bankruptcy, the successful

> conclusion of which will effect the fortunes of so many individual persons as well as corporate entities.

OC App. 7.

ARGUMENT

A. The Petition Is Not Timely

Petitioners knew of the facts about which they now complain and stood silent, waiting until the thirteenth hour to disclose them. The record shows either actual knowledge or reason to know years before the Petition was filed. And Petitioners' failure to assert their concerns sooner is fatal to a claim that an alleged appearance of impropriety requires recusal now. The law is clear; their Petition is too late.

Litigants must promptly move for recusal upon learning facts giving rise to a possible appearance of impropriety. *Martin*, 240 F.3d at 236-37; *In re Kansas Pub. Employees Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996) ("even though § 455 has no express timeliness requirements, claims under § 455 will not be considered unless timely made"); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987) ("It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim"); *Summers v. Singletary*, 119 F.3d 917, 920 (11th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *United States v. Int'l Bus. Machines (In re Int'l Bus. Machines)*, 618 F.2d 923, 932 (2d Cir. 1980).

The need for timely filing is obvious. It avoids unnecessary waste of judicial and litigant resources while discouraging the strategic use or timing of recusal motions after a litigant receives or expects an unfavorable ruling. *Cf. Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (condemning appellant's belated complaint about district judge's appointment of a technical advisor where the district court "advised the parties that it [would] . . . employ a technical advisor" and appellant "did not inquire as to the expert's identity or express any objection to the court's use of an (unknown) expert," failed to "request that any safeguards be set in place," and instead "sat back and knowingly acquiesced in the court's unconditional hiring of an unidentified technical advisor"). For this reason, Petitioners had a duty to inquire promptly when the District Court appointed the Advisors in the large asbestos-related bankruptcy cases assigned to it. *Id.*

It is beyond dispute that Petitioners' counsel in these bankruptcy proceedings has known for some time about Hamlin's and Gross's appointments in *G-I*. For timeliness purposes, Petitioners are "charged with knowledge of all facts known or knowable, if true, with due diligence from the public record or otherwise." *Universal City Studies, Inc. v. Reimerdes*, 104 F. Supp. 2d 334, 349 (S.D.N.Y. 2000) (internal quotation marks and citations omitted). *See also Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 2003-1 Trade Cases (CCH) ¶ 73,966 (S.D.N.Y. Feb. 6, 2003); *Hirschkop v. Virginia State Bar Ass'n*, 406 F. Supp. 721, 724 (E.D. Va. 1975);

Accord United States v. Daley, 564 F.2d 645, 651 (2d Cir. 1977), (holding application untimely because, *inter alia*, facts upon which it was based "as a matter of public record were at all times discernable by counsel"), *cert. denied,* 435 U.S. 933 (1978). Kensington and CSFB are charged with their lawyers' knowledge - - including all lawyers within the lawyers' law firm. *Jenkins v. Sterlacci*, 849 F.2d 627, 632-34 (D.C. Cir. 1988) (disqualification denied where a partner of the movant's counsel had knowledge of relevant facts), *reh'g denied*, 856 F.2d 274 (D.C. Cir. 1988); *Universal City Studios*, 104 F. Supp. 2d at 349. *Cf. Thomas v. N.A. Chase Manhattan Bank,* 1 F.3d 320, 325 (5th Cir. 1993) (finding that, under New York law, the knowledge of a partner or an agent is imputed to other partners and principals).

In the context of this case, a two-year delay in asserting grounds for recusal is inexcusable. During this two-year period, the Owens Corning bankruptcy estate has been charged millions of dollars in professional fees by the Bank Group, the Creditor's Committee, the Asbestos Claimants Committee, the Legal Representative For Future Asbestos Claimants, and Owens Corning's own counsel and other professionals who have been engaged in litigating the substantive consolidation motion and developing simultaneously the Proposed Plan.

If the District Court is recused, the month-long trial of the substantive consolidation issue, which is central to the Proposed Plan, may have to be retried. *See* Fed. R. Civ. P. 63. At a minimum, progress on the reorganization will be delayed

pending the re-litigation of the substantive consolidation issue. The advantages envisioned by Judge Becker and this Court - - in consolidating the administration of these five asbestos-related bankruptcies described as "critically important to the administration of justice" - - will be lost. Pet. App. 40-41.

Petitioners' delay bars them from making the "clear and indisputable" showing that is required for issuance of a writ of mandamus. *Delgrosso*, 903 F.2d at 237.

B. Petitioners Do Not Allege any Bias by the District Court

Even if it were timely, the Petition contains no allegation of bias in the conduct of the District Court. It does not allege that the District Court engaged in any extra-judicial fact-finding. It does not allege any action or interest of the District Court that raises any appearance of impropriety. *See* 28 U.S.C. § 455(a). Petitioners rely solely on the notion that they can impute to the District Court judge a ground for recusal arising from the well-known fact that two court-appointed advisors are advocates in a separate asbestos-related bankruptcy proceeding.

The Petition fails to overcome the legal hurdles to recusal. First, the District Court is presumed to be impartial. *In re Prudential*, 148 F.3d at 343; *Cobell v. Norton,* 237 F. Supp. 2d 71, 78 (D.D.C. 2003) ("The judge to whom a recusal motion is addressed is presumed to be impartial.") (citations omitted). Second, this Court has imposed a "more compelling standard for recusal under § 455(a) after the conclusion of a trial than before its inception." *Martin*, 240 F.3d at 237 ("After a massive

proceeding . . . when the court has invested substantial judicial resources and there is indisputably no evidence of prejudice, a motion for recusal of a trial judge should be supported by substantial justification, not fanciful illusion"); *Jenkins*, 849 F.2d at 634 (same). Third, disqualification by imputation on facts similar to those before this Court is unprecedented - - which is why the Petition relies upon faulty analogies that are not persuasive.

Kensington rests its argument almost exclusively on *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992). In that case, the district judge was alleged to have engaged in inappropriate conduct giving rise to the request for disqualification. There the judge was alleged to have attended an expenses-paid asbestos litigation conference sponsored by the plaintiffs' counsel and funded by settlement proceeds the judge himself had ordered disbursed. This Court held that those circumstances - - involving direct contact by the court with potential expert witnesses for the plaintiffs in the pending case, and direct receipt by the court of a gratuity in the form of a waiver of conference fees and free hotel accommodations - - raised the appearance of impropriety warranting the judge's recusal. *Id.* at 781-82. Those circumstances find no parallel here.

Nor is this a case involving a district court's relationship with its law clerks. *See* Petition at 22-23 *citing First Interstate Bank v. Murphy, Weir & Butler*, 210 F.3d 983, 985 (9th Cir. 2000) and *Hall v. Small Business Admin.*, 695 F.2d 175, 178-79

(5th Cir. 1983). The Advisors in this case do not share the same close and unregulated contact with the District Court that concerned the courts in *First Interstate* and *Hall*. Rather, the Advisors have been called upon to perform specific tasks not analogous to the services performed by judicial clerks. Indeed, other than the service of Advisor Dreier as a special master for certain discovery issues and the recommended ruling prepared by Advisor Hamlin on a discrete issue (to which Petitioners were not a party), the record does not reflect that the Advisors either performed any role or had any contact with the District Court regarding the adjudication of any disputed matter in the Owens Corning bankruptcy case. OC App. 21-27, 60-64. Furthermore, unlike law clerks, Petitioners have had the ability to monitor the activities of the Advisors through the time records that accompany their fee applications. Pet. App. 59-292. They have had the ability to object to those fee applications and, if necessary, to object to the Advisors' work on account of bias or prejudice. They have not.

The undisputed facts are that the Advisors are neither law clerks nor court-appointed experts. They are court-appointed consultants, a resource that district courts may utilize as a tool of complex litigation management. District courts tasked with managing complex and large-scale litigation are empowered to make a number of special referrals to various types of consultants, including court-appointed experts, special masters, magistrate judges, and "other referrals." MANUAL FOR COMPLEX

LITIGATION (Third) at 118. The "other referrals" include "consultation with a confidential advisor to the court." *Id.* at 125.

Each type of referral is subject to unique responsibilities and limitations. Thus:

> The grasp of [Federal Rule of Evidence] 706 is confined to court-appointed expert witnesses; the rule does not embrace expert advisors or consultants . . . [T]he procedural framework for nomination and selection of an expert witness and for the proper performance of his role after an appointment is accepted (e.g., advising the parties of his findings, submitting to depositions, being called to testify, being cross-examined) [has] marginal, if any, relevance to the functioning of technical advisors.

Reilly, 863 F.2d at 156 (1st Cir. 1988). *See e.g. Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (finding that district court authority to appoint expert advisors or consultants does not derive from Federal Rule of Evidence 706 but from either Federal Rule of Civil Procedure 53 or the inherent power of the court). Accordingly, Kensington's reliance on recusal cases involving court-appointed experts is as equally misplaced as its reliance on cases involving law clerks.

In *Edgar*, a principal case upon which Kensington relies, the district judge was disqualified because he met *ex parte* with Federal Rule of Evidence 706 court-appointed neutral experts to discuss the merits of the case -- in contradiction to the appointment order that *could have*, but did not, provide for *ex parte* communication. 93 F.3d 256, 257-60 (7th Cir. 1996). The court-appointed experts conducted a factual investigation outside the presence of counsel. Thereafter, the court engaged in extra-

judicial fact-finding by consulting *ex parte* with the expert panel about their preliminary findings. The substance of these contacts was apparently not disclosed to the defendants in that case for approximately one year. *Id.* Thus, *Edgar* has no application here.

Curiously, Petitioners have made no request to recuse Gross or Hamlin. Yet, had they done so, that request also would fail. Pure neutrality is not required of court-appointed advisors.[14] Indeed, even court-appointed experts who are subject to the strictures of Federal Rule of Evidence 706 are not expected to be entirely neutral. This is so because "[t]ruly neutral experts are difficult, if not impossible, to find; though they will have no commitment to any party, they do not come to the case free of experience and opinions that will predispose (even if only subconsciously), or may be perceived to predispose, them in some fashion on disputed issues relevant to the case." MANUAL FOR COMPLEX LITIGATION (Third) at 119. Thus, the MANUAL recognizes the practical value of appointing confidential advisors in complex

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[14] Kensington quotes the MANUAL FOR COMPLEX LITIGATION for the proposition that the district court is duty-bound to ensure that its "advisors' fairness and expertise in the field cannot reasonably be questioned.'" Pet. at 22. The MANUAL makes no such representation concerning court-appointed *advisors*. Rather, the MANUAL states that the fairness and expertise of court-appointed *experts*—who are subject to the guidelines of Federal Rule of Evidence 706—should not be questionable. MANUAL FOR COMPLEX LITIGATION (Third) 120. At best, the Court can presume that Kensington does not understand the distinction between court-appointed experts and court-appointed advisors and that it somehow missed the preceding discussion on page 119, where the MANUAL states that the likelihood of finding even a "truly neutral" Rule 706 expert is miniscule.

litigation even where those advisors are not free of predisposition. *Id.* In giving this advice, the authors of the MANUAL clearly did not contemplate that the appointment of a consultant with an alleged predisposition would subject the District Court to recusal.

The Second Circuit, in virtually identical circumstances, found no basis for recusal where an administrator designee (acting as a special master) in an action brought by the EEOC was simultaneously representing a union that was a defendant in an unrelated case also brought by the EEOC. *Rios v. Enter. Ass'n Steamfitters Local Union* 638 et al., 860 F.2d 1168, 1173-75 (2d Cir. 1988). Recognizing the district court's "need to hire individuals with expertise in particular subject matters," the Second Circuit emphasized that "accommodation is required to the likelihood that special masters will be engaged as advocates in matters other than those in which they serve as masters." *Id.* at 1174 (*quoting Jenkins*, 849 F.2d at 632). *See also In re Joint Eastern and Southern Districts Asbestos Litig.*, 737 F. Supp. 735, 742 (E. & S.D.N.Y. 1990) (denying request to disqualify a mediator in asbestos tort litigation).

The practical implications of the recusal rule Petitioners advocate display its fundamental flaws. Under Petitioners' reasoning, the recusal of a magistrate judge in the midst of a complex case would also require, regardless of the circumstances, the recusal of the supervising district judge because the magistrate judge may have consulted the district court on case management. Likewise, the appointment and

subsequent recusal of a special master appointed under Fed. R. Civ. P. 53 would also require the recusal of the federal district judge for similar reasons. Nothing in Rule 53 contemplates such a result. Rather, especially where questions of law and judicial case management are involved, a district court judge is presumed to be able to discern and reject bad recommendations or advice. *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 995 (2002). *See also* OC App. 63-64 (Affidavit of C. Judson Hamlin at ¶ 13 noting that Judge Wolin "did not use" a draft ruling prepared by him).

In sum, Petitioners' reasoning falls flat on the basic tenet of American judicial governance: "The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office." *Liteky v. United States*, 510 U.S. 540, 562 (1994) (concurring opinion).

C. If This Court Does Not Summarily Deny The Petition, It Should Remand The Matter To The District Court

The Petitioners are asking the Court to view the District Court's stay and subsequent case management orders as a refusal to consider the recusal motion - - an assumption that has no basis in fact or law. As the District Court's Response makes clear, the short delay was temporary and excusable. OC App. 2-3. This certainly was not an abuse of discretion. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 182, 185 (2d Cir. 1991) (*per curiam*) (finding that a district judge's order staying discovery of a court-appointed advisor after a motion to recuse was filed was not an

abuse of discretion). Furthermore, consideration of the alleged grounds is properly before the District Court in the first instance. As shown above, the District Court is intimately familiar with the record, which itself is central to any recusal determination. If this Court cannot deny the Petition on the ample record before it, it should remand the motion to recuse to the District Court.

The Petition fails to include a single citation that supports the real result it seeks - - a Third Circuit mandate that the District Court disqualify itself *before* it has even had a chance to adjudicate the issue. "Mandamus is a proper means for this court to review a district judge's *refusal* to recuse from a case pursuant to 28 U.S.C. § 455(a)," *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993) (emphasis added), but in this case there is no District Court refusal for the Court to review.

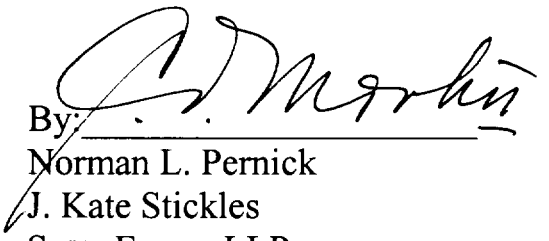
Necessarily, the petitioners are asking the Court to peremptorily disavow the settled rule that "[d]iscretion is confided in the district judge in the first instance to determine whether to disqualify himself . . . [because the] judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) (internal citation omitted); *see Apple*, 829 F.2d 326, 333 (2d Cir. 1987); *e.g.*, *In re Prudential*, 148 F.3d 283, 343 (3d Cir. 1998) (reviewing disqualification issue "under an abuse of discretion standard"). Nothing in the record substantiates the

conclusion that the District Court is incapable of exercising its jurisdictional authority to decide the recusal motion or that it must be stripped, by extraordinary writ, of its adjudicatory power to rule on the issue in the first instance.[15]

CONCLUSION

For these and the other reasons stated above, Owens Corning respectfully requests that this Court dismiss the Emergency Petition for a Writ of Mandamus.

Respectfully submitted,



By: _____
Norman L. Pernick
J. Kate Stickles
SAUL EWING LLP
222 Delaware Avenue, Suite 1200
Wilmington, DE 19801
(302) 421-6800

and

Charles O. Monk, II
Matthew G. Dobson
SAUL EWING LLP
100 South Charles Street
Baltimore, MD 21201
(410) 332-8600
Counsel to Owens Corning *et al.*

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[15] Indeed, this Circuit has held that a district judge who either has not yet ruled on a disqualification motion or has refused to disqualify himself does not err in "continuing to consider merits motions while disqualification . . . [is] pending." *In re Sch. Asbestos Litig.*, 977 F.2d at 784 n.26. The district court's authority and presumed impartiality is not cast overboard *sua sponte* simply because a recusal motion surfaces.

William J. Hanlon, Esquire Schnader Harrison Goldstein & Manello 265 Franklin Street Boston, MA 02110
Fritz A UPS Company 636 Sandy Lake Road Coppell, TX 75019
Victor Simonte DK Acquisition Partners, L.P. 885 Third Avenue New York, NY 10022
Ashley White First Commercial Credit 10 New King Street White Plains, NY 10604
John J. Farmer, Jr., Esquire Market A. Hollan, Deputy AG R.J. Hughes Justice Complex 25 Market Street, P.O. Box 106 Trenton, NJ 08625
Ms. Nicolle A. Poian, Operations Manager Newstart Factors, Inc. 2 Stamford Plaza, Suite 1501 281 Tresser Boulevard Stamford, CT 06901
Michael Idzkowski, Esquire Timothy J. Kern Environmental Enforcement Section 30 East Broad Street, 25th Floor Columbus, OH 43215
Securities & Exchange Comm 15th & Pennsylvania Ave, N W Washington, D.C. 20020
District Director IRS 409 Silverside Road Wilmington, DE 19809
Christopher O'Brien, Esquire District Tax Attorney Office of Counsel Building 9, Room 100 WA Harriman Campus Albany, NY 12227
Robert G. Cass, Equire MCI 6929 N. Lakewood Avenue MD 5.3-409F Tulsa, OK 74117
Curtis Deane BNP Paribas 787 Seventh Avenue, 30th Floor New York, NY 10019

Law Office of Richard F. Broude 400 E. 84th Street, 22A New York, NY 10028
Shawn Janko Wachovia Bank 191 Peachtree Stree, 28th Floor Internal MC GA370 Atlanta, GA 30303
Harry D. McLachlin The Bank of Tokyo Mitsubishi, LTD 227 West Monroe Street, Suite 2300 Chicago, IL 60606
Kristina L. Anderson Suntrust Bank 303 Peachtree Street, 4th Floor Atlanta, GA 30308

And by first-class mail, postage prepaid, to the following persons:

Rosa Dominy
Bankruptcy Administration
ISO Capital, Inc.
1738 Bass Road
P.O. Box 13708
Macon, GA 32108

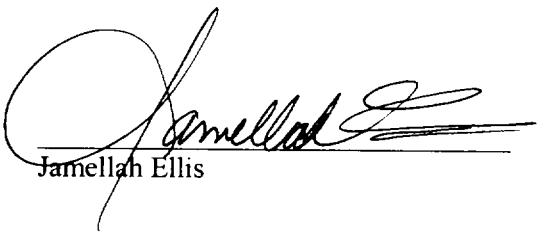
Byron Arnold
PO Box 16
Lovelady, TX 75851

Secretary of Treasury
P.O. Box 7040
Dover, DE 19903

Support Center
PO Box 4918
Monroe, LA 71211-4918

James Berman, Esquire
Zeisler & Zeisler, P.C.
558 Clinton Avenue
PO Box 3186
Bridgeport, CT 06605

City of Knoxville
Hillary Browning-Jones
Assistant City Attorney
PO Box 1631
Knoxville, TN 37901



Jamellah Ellis